

applicable to such service and company; to use ratemaking methods different than those in existing law to set rates for basic local exchange service and other telecommunications services not found to be competitive; and to exempt certain local exchange carriers (those having less than 15,000 access lines) from various provisions of existing law or to prescribe alternative regulatory requirements for that company and its services. The General Assembly adopted Section 4927.02, Revised Code, which provides that it is the policy of this state to:

- (1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;
- (2) Maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;
- (3) Encourage innovation in the telecommunications industry;
- (4) Promote diversity and options in the supply of public telecommunication services and equipment throughout the state; and
- (5) Recognize the continuing emergency of a competitive telecommunications environment through flexible regulatory treatment of public telecommunication services where appropriate.

Following the adoption of H.B. 563, the Commission initiated several dockets designed to implement these provisions. First, the Commission opened *In the Matter of the Commission Investigation Into Implementation of Sections 4927.01 Through 4927.05, Revised Code, as They Relate to Competitive Telecommunication Services*, Case No. 89-563-TP-COI (563), on April 12, 1989. The purpose of this docket was to revisit whether, in light of the legislative changes made by H.B. 563, the then-current regulatory framework for competitive telecommunication service providers was appropriate. By order adopted on October 22, 1993, as modified on rehearing on December 22, 1993, we determined that additional regulatory flexibility was warranted for competitive telecommunication service providers.

Recognizing the small customer bases and limited resources of those incumbent local exchange companies (ILECs) serving fewer than 15,000 access lines in Ohio, on June 20, 1989, the Commission initiated a docket, to address the appropriateness of an alternative form of regulation for small LECs, *In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 to 4927.05, Revised Code, as They Relate to Regulation of Small Local Exchange Telephone Companies*, Case No. 89-564-TP-COI (564). That proceeding culminated in the adoption of alternative regulatory requirements involving rate and tariff changes effective September 1, 1991.

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On July 2, 1992, after a detailed informal workshop process open to all stakeholders, the Commission initiated a docket, *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Telephone Companies*, Case No. 92-1149-TP-COI (1149), to establish a framework whereby large LECs could seek to utilize the flexibility found in Sections 4927.03 and 4927.04, Revised Code, concerning exemption from or alternative regulatory requirements for certain telecommunications services. In adopting our order in that matter, we stated that "[T]hese rules are simply the next step begun in our 944 cases to relax regulation as we move toward a more competitive environment." Today, we take that next transitory step toward a fully competitive market in which consumers benefit from more rapid deployment of advanced technology, more choices of providers, and the potential of lower prices for all.

By entry issued on September 27, 1995, we opened this docket and invited interested stakeholders to formally comment on staff's proposal concerning the establishment of local exchange competition in Ohio. We recognized at that time that staff's proposal had already been the subject of significant input from interested stakeholders.¹ In order to reach out and obtain input from Ohio's telecommunications users and in order to allow those persons not wishing to file formal comments to be heard on this matter, the Commission scheduled and published notice of a number of public meetings to be held around the state. The Commissioners personally conducted public forums at Athens, Cleveland Heights, Cleveland, Warren, Dayton, Cincinnati, Vanlue, Akron, Toledo, and Columbus between October 11 and November 1, 1995. At those meetings, members of the public were invited to share their views and express their concerns regarding the staff's local competition proposal. The public's comments were transcribed and made a part of this docket. In addition, the Commission has received, throughout the comment process, a number of letters from the public which have been made a part of the record in this case. The Commission received initial and reply comments to the staff's proposal from various stakeholders on December 14, 1995, and January 31, 1996, respectively.

Subsequent to the submission of reply comments in this matter, the United States Congress passed legislation and the President signed such legislation overhauling the Communications Act of 1934. This newly enacted legislation (the 1996 Act) touches on a number of issues addressed in the staff's local competition proposal. On February 20, 1996, Ameritech Ohio (Ameritech) filed a motion seeking to establish an expedited supplemental pleading cycle as a result of the passage of the 1996 Act. The attorney examiner assigned to this matter found Ameritech's motion well-made and, consequently, directed interested stakeholders to file supplemental comments by March 8, 1996, and supplemental reply comments by March 15, 1996. The record in this matter

¹ In preparing its proposal for formal comment, staff had already evaluated over 5,000 pages of written material, conducted 17 days of workshops with interested stakeholders, and held numerous additional meetings with individual entities outside the workshop process. Further, staff widely circulated an initial proposal, thoroughly reviewed the comments received on the initial proposal, and revised its proposal accordingly.

reveals that the following entities have, at some point in this proceeding, submitted initial comments, reply comments, supplemental comments, or supplemental reply comments:

MFS Communications Company, Inc.; Ohio Cable Telecommunications Association; MCI Telecommunications Corporation; Cincinnati Bell Telephone Company; Enhanced Telemanagement, Inc.; Time Warner Communications of Ohio; The Office of the Consumers' Counsel; ALLTEL Ohio, Inc. and The Western Reserve Telephone Company; United Telephone Company of Ohio and Sprint Communications Company, L.P.; Ameritech Ohio; The Ohio Telephone Association; Chillicothe Telephone Company; Century Telephone of Ohio, Inc.; the small local exchange telephone companies of Ohio; ICG Access Services, Inc.; USA Mobile Communications, Inc. II, Maximum Communications, Inc., MobileComm of the Northeast, Inc., Paging Network of Ohio, Inc., and Southern Communication Services, Inc.; City of Columbus; cities of Delaware, Dublin, Upper Arlington, Westerville, Worthington, and the Village of Powell; Telephone Service Company; New Par; Appalachian People's Action Coalition; Telecommunications Resellers Association; Ashtabula County Telephone Coalition; Ohio Direct Communications, Inc. and Ridgefield Homes, Inc.; National Emergency Number Association; Communications Buying Group, Inc.; United States Department of Defense and all other Federal Executive Agencies; City of Cincinnati; Ohio State Legislative Committee of the American Association of Retired Persons; AT&T Communications of Ohio, Inc.; City of Cleveland; Competitive Telecommunications Association; City of Toledo; Ohio Domestic Violence Network; Scherers Communications Group, Inc.; Westside Cellular Inc. dba Cellnet of Ohio, Inc.; GTE North Incorporated; Edgemont Neighborhood Coalition; and TCG Cleveland.

After reviewing the staff's proposal, appended to the September 27, 1995 entry, the comments, reply comments, and supplemental comments submitted in this matter, the testimony given at the forums, and the letters filed in this docket, the Commission is, today, adopting a new regulatory framework to govern local exchange competition in Ohio as set forth in Appendix A. This new regulatory framework will be referred to throughout this order as the revised local competition guidelines (guidelines). References to the initial guidelines appended to the September 27, 1995 entry will be referred to as staff's proposal.

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DISCUSSION:**A. Legal Authority**

Before commencing with a discussion of the regulatory guidelines which will govern local exchange competition, we must address the Commission's legal authority for promulgating the new guidelines. In its Appendix A filed on December 14, 1995, Cincinnati Bell Telephone Company (Cincinnati Bell)², citing to *Canton Storage & Transfer Co. v. Pub. Util. Comm. of Ohio*, 72 Ohio St. 3d 1 (1995), argues that the Commission is a creature of statute and can only operate consistent with its legislative authority. Cincinnati Bell posits that the Commission failed to cite any statutory authority which permits it to adopt rules to govern local exchange competition. Cincinnati Bell claims that Section 4927.02, Revised Code, does not authorize this proceeding and, in fact, Section 4927.03(B), Revised Code, expressly prohibits the Commission from approving or authorizing:

. . . any exemption from or modification of any provision of Chapter 4905 or 4909 of the Revised Code or order issued under them which would impair the exclusive right of any telephone company under those chapters, rules, or orders to provide basic local exchange service in the local service areas in which such service is provided by the Company on the effective date of this Section.

Since, in many instances, the staff's proposal authorizes exemptions from or modifications to the provisions of Chapters 4905 and 4909, Revised Code, Cincinnati Bell claims that these guidelines impair Cincinnati Bell's "exclusive right" to provide basic local exchange service. Cincinnati Bell further avers that the implementation of local exchange competition is a quasi-legislative function which cannot be delegated to the Commission without express statutory authority. In support of this position, Cincinnati Bell points to Section 1, Article II of the Ohio Constitution which vests all legislative power in the General Assembly and Section 26, Article II of the Ohio Constitution which has been interpreted to prohibit the delegation of this legislative authority except where the General Assembly has provided sufficient, definite standards with which to use the power. *Independent Insurance Agents of Ohio, Inc. v. Duryee*, 95 Ohio App. 3d 7 (1994). Cincinnati Bell maintains that the General Assembly has not enacted the requisite enabling legislation, much less the definite standards necessary to guide the Commission. Cincinnati Bell also opines that the only provision of Ohio law which arguably enables the Commission to create local competition is Section 4905.24,

² Ameritech, ALLTEL Ohio, Inc. (ALLTEL) and The Ohio Cable Telecommunications Association (OCTA) urge the Commission to specify whether these guidelines are being adopted as formal additions to the Ohio Administrative Code (O.A.C.). That issue will be addressed along with the legal arguments raised by Cincinnati Bell

Revised Code (Cincinnati Bell supp. comments at 5). Cincinnati Bell also argues that it has been denied due process in the certification cases heretofore conducted pursuant to Section 4905.24, Revised Code, concerning Time Warner Communications of Ohio (Time Warner) (Case No. 94-1695-TP-ACE), MCI Metro Access Transmission (Case No. 94-2012-TP-ACE), and MFS Intelnet of Ohio, Inc. (Case No. 94-2019-TP-ACE).

We disagree with Cincinnati Bell's interpretation of our ability to promulgate guidelines governing the establishment of local exchange competition, with its suggestion that its due process rights have been violated in the aforementioned certification cases, and with its inference that this generic docket is the appropriate vehicle in which to raise concerns regarding the certification proceedings. Taking Cincinnati Bell's due process arguments first we find these arguments to be without merit.

In *Application of Time Warner*, Case No. 94-1695-TP-ACE (August 24, 1995), at page 6, we addressed the legal issue of the Commission's authority to authorize Time Warner to provide basic local exchange services in that proceeding, not in some future generic docket. The Commission concluded in 94-1695 that "Time Warner has met its burden of establishing that the granting of its authority is proper and necessary for the public convenience, in that it has demonstrated that it is capable of providing service such that it would promote competition consistent with the state's telecommunications policy." Cincinnati Bell intervened and participated in 94-1695 and has appealed the Commission's determination in that case to the Ohio Supreme Court. Therefore, we find that, notwithstanding its argument to the contrary, Cincinnati Bell has been fully afforded due process to argue the Commission's authority, under Section 4905.24, Revised Code, to certify Time Warner to provide basic local exchange service in Cincinnati Bell's operating territory.

Cincinnati Bell also argues that the Commission failed to cite and, nevertheless does not have, the requisite statutory authority to permit local exchange competition in Ohio. General Code Section 614-52, the precursor of Section 4905.24, Revised Code, clearly enabled the Commission to authorize more than one telephone company to provide telecommunications service in a given area and, by so doing, specifically authorized local exchange competition within Ohio. Section 614-52, General Code, was first adopted in 1911 and continues to this day virtually unchanged as Section 4905.24, Revised Code. Section 4905.24, Revised Code, states, in relevant part:

[N]o telephone company shall exercise any permit, right, license, or franchise. . .for the furnishing of any telephone service. . .where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the public utilities commission a certificate... that the exercising of such license, permit, right, or franchise is proper and necessary for the public convenience. (Emphasis added).

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Although there are no modern court cases interpreting Section 4905.24, Revised Code, the Ohio Supreme Court, in a decision rendered in 1921, addressed both the constitutionality of this statute as well as the authority granted the Commission by the legislature under this statute. In confirming the authority of the Commission to certify multiple providers of telephone service and, thereby, sanctioning competition for local telephone service, the Ohio Supreme Court found in *Celina*, at 499:

It is important to notice that the section (614-52) does not prohibit another company from competing, but makes it a condition precedent to engaging in the business in the way of competition for that company to first apply for and receive a certificate from the Public Utilities Commission. The commission in the act is provided with all the facilities to investigate and determine whether the public convenience will be served, and in so doing must determine first whether the company is furnishing adequate service, and next, irrespective of whether it is or is not so doing, find whether or not the public convenience will be better served by granting the certificate to a competing company.

In discussing the constitutionality of Section 614-52, General Code, the Ohio Supreme Court determined in *Celina* at 505, that:

Whether or not the principle of permitting or favoring a monopoly in the field in question is one sound in the political and economic view is one obviously for determination by the legislative branch of the government, and not by the judicial branch. In this state the legislature has made that determination in certain fields by various provisions in the public utilities act.

Therefore, as early as 1911, the Ohio General Assembly authorized this Commission to determine whether or not local exchange competition is proper and necessary for the public convenience. With the adoption of H. B. 563, the Ohio General Assembly confirmed, through enactment of Section 4927.02, Revised Code, that the Commission is to consider the policy of this state (which is stated on page 3 of this order) when carrying out Sections 4927.03 and 4927.04, Revised Code.³ Section 4927.02, Revised Code, clearly complements the Commission's authority to establish local exchange competition. In fact, by its adoption, the Ohio General Assembly was instructing the Commission to consider this policy in its deliberations concerning competitive markets.

³ Section 4927.03, Revised Code, authorizes the Commission to establish exemptions or alternative regulatory requirements for competitive telephone companies. Section 4927.04, Revised Code, permits the Commission to adopt an alternative method of establishing rates for basic local exchange service for telephone companies.

Since the opening of this docket, Congress passed and the President signed the 1996 Act. The Commission established an additional comment cycle to allow parties to address the impact of the 1996 Act. The Commission is issuing these guidelines to implement both the telecommunications policy of this state embodied in Section 4927.02, Revised Code, and the 1996 Act. Most recently, the Ohio General Assembly by adoption of Senate Bill 306, specifically affirmed the Commission's ability to implement the 1996 Act.⁴

Cincinnati Bell's constitutional arguments addressed in Appendix A, of its December 14, 1995 comments, as well as its reliance upon *Duryee* and *Canton Storage*, are equally flawed. *Duryee* addressed the issue of whether res judicata bars a subsequent action challenging the constitutionality of a statute.⁵ The issue decided in *Duryee* by the Franklin County Court of Appeals is not at issue in this proceeding. Assuming arguendo, that the issue was the constitutionality of Section 4905.24, Revised Code, as noted in *Celina supra*, the Ohio Supreme Court has already determined that the involved statute is constitutional. The Commission in this proceeding is merely establishing guidelines to implement the authority already conferred upon us by the Ohio General Assembly. Thus, *Duryee* is inapplicable to this proceeding.

The *Canton Storage* case is also distinguishable from and, therefore, inapplicable to the Commission's authority to promulgate guidelines to govern competition in the telecommunications marketplace. In *Canton Storage*, the appellants challenged a Commission decision to grant 22 contested applications to carry household goods throughout the state of Ohio. In so doing, the Commission was exercising its certification authority for motor transportation companies found in Section 4921.10, Revised Code. The Ohio Supreme Court, in reversing the Commission, found that the record did not support the Commission's determination of a public need for the service and that, in the absence of specific legislation, the Commission was without the statutory authority to promote competition in the motor transportation area. As we have noted previously, the General Assembly has determined through specific legislation that the Commission has the authority to certify multiple providers of local telecommunications service. However, more importantly, the issue now before us does not involve the certification of any particular provider to compete in the local market as *Canton Storage* did. As noted earlier, the appropriate place to raise that challenge is in an individual company certification proceeding which Cincinnati Bell has done in the Time Warner case currently before the Ohio Supreme Court. This proceeding, on the other hand, involves the establishment of guidelines by which local competition for telecommunications service will unfold in Ohio.

As a final matter on this issue, it is interesting to note that Cincinnati Bell is the only ILEC who argued that we lack the requisite legal authority to promulgate these

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guidelines. Most commenting parties, including a number of ILECs, support the Commission's moves to open the local exchange market to competition. For instance, in their joint comments submitted in this matter, United Telephone Company of Ohio and Sprint Communications Company L.P. (United/Sprint) stated that "[a]s a local exchange company operating in Ohio, United has consistently declared its support for the introduction of competition into the local exchange market" (United/Sprint, initial comments at 1). Another example of ILEC support comes from Ameritech who declared "Ameritech Ohio supports the creation of fully competitive markets for communications services including the offering of competitive local exchange services" (Ameritech initial comments at 1). Both United/Sprint and Ameritech are equally impacted by any decision to authorize local exchange competition and yet neither argue that we lack the requisite legal authority to do so.

B. Regulatory Guidelines versus Administrative Rules

Having determined that local exchange competition has been authorized by the Ohio General Assembly, that the Commission has been empowered with the legislative determination of when, if ever, to sanction competition, and having established the constitutionality of this legislative grant of authority, we must now turn to the issue of our authority to promulgate guidelines, in lieu of administrative rules, to govern local exchange competition. ALLTEL's argument that the Commission must promulgate these procedures as formal additions to the O.A.C. in order for them to have any force and effect.⁶ The Commission has, on numerous prior occasions without challenge, adopted guidelines to effectuate competitive policies in lieu of promulgating O.A.C. rules. By so doing, the Commission has relaxed and streamlined regulatory obligations which have benefitted all telephone companies. Examples of such cases include 944, 1144, 563, 564, and 1149. Ameritech and ALLTEL availed themselves of the regulatory guidelines promulgated in several of the aforementioned proceedings at one time or another. Those same parties should not now be heard to complain that this lawful regulatory mechanism in some manner violates their interests in this proceeding.

Having thoroughly considered the comments on this matter, the Commission determines that the most appropriate manner in which to proceed is to adopt these local competition procedures as guidelines as opposed to O.A.C. rules. By treating these as guidelines, we are enabling the Commission to maintain flexibility to make modifications, if found necessary, without having to await the more cumbersome process associated with formal changes to the O.A.C. We find their arguments to the contrary to be shortsighted and potentially inconsistent with the interests of telephone companies.

On this issue, it is instructive to review the Commission's enabling statute, Section 4901.02, Revised Code, which states:

⁶ Ameritech likewise sought clarification as to whether these proposals were being adopted as formal O.A.C. rules or whether these proposals were mere statements of policy.

The Commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code.

In addition, the Commission is provided ample discretion by other sections of Title 49 of the Ohio Revised Code, such as Section 4905.04, Revised Code, which vests the Commission "with power and jurisdiction to supervise and regulate public utilities," and Section 4905.06, Revised Code, which delegates to the Commission "general supervision over all public utilities within its jurisdiction." Other statutes throughout Title 49 similarly grant to the Commission a large measure of discretion in determining "just and reasonable rates" (Section 4909.15, Revised Code); "adequacy of service" (Section 4905.22, Revised Code); and the "justness" and reasonableness of telephone company rules, regulations, and practices" (Section 4905.381, Revised Code). The General Assembly, in adopting H.B. 563, also directly authorized the Commission to adopt the standards necessary to carry out those provisions.⁷ This broad statutory language, coupled with the underlying objective of regulating in the public interest and taking into account the policy of this state as set forth in Section 4927.02, Revised Code, leads this Commission to determine that broad latitude is necessary to adapt regulatory policy to the changing circumstances within Ohio's telecommunications environment.

The Commission also has an independent basis for promulgating guidelines to govern local exchange competition in Ohio. As noted above, the Ohio General Assembly, through adoption of Section 4905.24, Revised Code, the constitutionality of which was established in *Celina*, delegated to this Commission the determination of when and under what circumstances, if ever, to sanction competition in the local exchange market. Through the promulgation of these guidelines, the Commission is merely exercising the authority granted us in Section 4901.13, Revised Code, to adopt and publish rules governing proceedings and to regulate the mode and the manner of valuations, tests, audits, inspections, investigations, and hearings relating to local exchange competition in Ohio. The delegation of legislative authority to the Commission by the General Assembly has long been upheld as constitutional by the Ohio Supreme Court. For instance, in *Matz v. J. L. Curtis Cartage, Co.*, 132 Ohio St. 271 (1937), the court determined that, as a general rule, the Ohio General Assembly cannot delegate legislative authority to an administrative board. The court went on to find, however, that:

when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety, or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.

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when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety, or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.

⁷ Sections 4927.03(E) and 4927.04(D), Revised Code

The guidelines we are adopting today clearly meet the standards set forth by the Ohio Supreme Court to justify a constitutional delegation of legislative authority to this Commission. First, without a doubt the local competition guidelines are designed to protect the general welfare of all Ohioans. Next, due to the technical nature of the issues involved, it is reasonable for the General Assembly to have declined to enact such detailed pricing formulas, which, by virtue of their being embodied in statute, would restrict Ohio's ability to move forward with and respond to the changing telecommunications environment and thus frustrate the General Assembly's policy set forth in Section 4927.02, Revised Code. Thus, in this instance, the court's test for determining if a proper delegation of legislative authority has been met.

C. Regulatory Symmetry

Another issue raised by many of the commenters was the issue of regulatory symmetry or parity. On the one hand, ILECs claim that the staff's proposal establishes asymmetrical regulations which favor the NECs over the ILECs.⁸ The ILECs argue, therefore, that staff's proposal creates an unlawful and discriminatory preference for NECs to the detriment of ILECs. The Ohio Telephone Association (OTA) claims that the authority reserved to the states through Section 253(b) of the 1996 Act mandates parity and symmetry in any local competition guidelines this Commission ultimately adopts (OTA supp. comments at 1-2). Ameritech asserts that the Commission was faced with a similar decision regarding AT&T Communications of Ohio, Inc. (AT&T) at the advent of long distance competition and that this Commission, at that time, rightfully rejected the concept of asymmetrical regulation (Ameritech initial comments at 6). Ameritech also claims that missing from the staff's proposal is a thorough analysis and understanding of the impact of the rules on consumers and the overall public interest as required by Ohio policy. ALLTEL posits that the Commission should conduct a comprehensive review of the existing telecommunications rules and eliminate all current rules deemed unnecessary to protect the public interest. Thereafter, all LECs should be subject to these relaxed rules (ALLTEL reply comments at 37).

The NECs, on the other hand, argue that saddling them with the same regulatory requirements applicable to the incumbents or granting the incumbents the regulatory freedoms requested by them will destroy the nascent competition. The NECs claim that competition and regulation are substitutes for each other and that regulation should be commensurate with the degree of market power exercised by a firm. In order for regulation to be relaxed or eliminated for the ILECs, these commenters maintain that genuine competitive offerings must be widely and easily available to customers. The NECs also encourage the Commission to recognize the necessity of asymmetrical regulation as have the states of Wisconsin, Florida, and Colorado. The NECs generally agree, however, that widespread regulation of new local service providers is unnecessary and would raise costs for the NECs and ultimately for subscribers. They state that extensive regulatory requirements on NECs would also constitute a barrier to

⁸ Incumbents, incumbent LECs, or ILECs will be used to characterize that class of commenters providing local telecommunication services throughout the 748 exchange areas on the date this order issued.

entry. NECs acknowledge that in limited situations it may be necessary for the Commission to apply certain regulatory requirements on all competitors; however, overall, the ILECs' regulatory symmetry arguments should be rejected as anti-competitive, according to the NECs.

Having thoroughly considered the comments on this issue, we agree that, to the extent feasible, it is appropriate to adopt guidelines that do not unduly favor any LEC over another⁹. However, in developing our final guidelines on local competition we note with approval United/Sprint's challenge that any local competition guidelines should strive for balance between all providers. According to United/Sprint, that does not mean that there must be identical regulatory parity for ILECs and NECs,¹⁰ but neither does it mean that NECs be given free rein (United/Sprint reply comments at 1). With these competing goals in mind and in light of the 1996 Act, the Commission has revised staff's proposal in a manner which appropriately weighs the need for certain NEC regulations balanced against the monopoly power yielded by the ILECs. The guidelines, as revised, still reflect different treatment for ILECs and NECs in certain areas. However, we disagree that to do so amounts to unlawful and discriminatory preference for the NECs. Symmetrical regulation is only appropriate when circumstances are symmetrical. Given that the ILECs, as of the issuance of these guidelines, control essential bottleneck monopoly facilities and retain the attributes of their status such as ownership and control over the assignment of telephone numbers, the circumstances are not perfectly symmetrical. We have, however, looked for establishing symmetry where appropriate, in light of the ILECs' comments. For example, in areas where there is competition we have established symmetrical treatment of ILECs and NECs concerning the timing of new services and related filings where there is an operational competitor in the ILEC's market. We agree with TCG Cleveland (TCG) that the AT&T analogy raised by Ameritech is distinguishable from the situation now before us. As noted by TCG, AT&T in 1985 no longer controlled any essential facilities needed to reach the ultimate consumer. However, for local exchange competition, the ILECs will, for the foreseeable future, continue to control the essential network facilities necessary to feasibly originate and terminate calls for end users. This factor alone justifies a difference in regulatory obligations between the ILECs and the NECs. In addition, we note that, OTA's arguments to the contrary notwithstanding, the 1996 Act has recognized, in Section 251, a distinction in the manner in which ILECs are treated as compared to the NECs. As a final matter, we are committed to continually monitor the guidelines set forth herein and, to the extent the Commission determines in the future it is appropriate to amend any guideline to alter the requirements on any local provider we will do so. We have committed to our own review of these guidelines on an ILEC by ILEC or industry-wide basis no later than three years after the adoption of these guidelines. In addition, we have made other avenues such as

⁹ In this order, the term LECs will be used to represent both NECs and ILECs.

¹⁰ NECs will be used throughout this Order to represent both new entrants as well as the ILEC affiliates which will, as discussed more fully below, be permitted to provide service in other incumbents' serving areas.

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⁹ In this order, the term LECs will be used to represent both NECs and ILECs.

¹⁰ NECs will be used throughout this Order to represent both new entrants as well as the ILEC affiliates which will, as discussed more fully below, be permitted to provide service in other incumbents' serving areas.

Sections 4927.03 and 4927.04, Revised Code, available to the ILECs should they feel the need to petition for relief prior to that time.

I OVERVIEW OF THE GUIDELINES

As noted above, the comprehensive revision of the 1934 Telecommunications Act by the 1996 Act has caused us to revise, significantly, particular areas of staff's proposal. One such area which has been significantly revised is the former Compensation Section which has now been broken down into Interconnection, Transport, and Termination of Traffic Compensation, and Pricing Standards. Another portion of staff's proposal that has been reworked substantially is the Resale Section. The final area which has been significantly revised is the Universal Service Section. These areas will be discussed in more detail below.

II CERTIFICATION ISSUES

A. Jurisdiction

Staff's proposal stated that all facilities-based and nonfacilities-based entities seeking to provide basic local exchange services in accordance with Section 4905.03(A)(2), Revised Code, would be considered telephone companies subject to Commission jurisdiction. In addition, such entities would be required to obtain a certificate of public convenience and necessity from the Commission prior to offering basic local exchange service in the State of Ohio. A facilities-based provider was defined, for purposes of these guidelines, as a local service provider that directly owns, controls, operates, and maintains a local switch used to provide dial tone to that provider's end users in a specific circumscribed portion of its serving area. Such a carrier would be deemed facilities-based with respect to that circumscribed portion of its serving area to which it provided dial tone via its own local switch. Conversely, a nonfacilities-based provider was defined as a local service provider that does not directly own, control, operate, or maintain a local switch used to provide dial tone to end users in a specific circumscribed serving area. Such a carrier would be deemed nonfacilities-based with respect to those portions of its serving area in which it did not provide dial tone via its own local switch. Other areas of the staff proposal set forth varying rights and responsibilities depending upon whether the NEC was classified as facilities or nonfacilities-based. This portion of staff's proposal engendered significant comments.

Many commenters maintain that the distinction between facilities-based and nonfacilities-based carriers should be eliminated throughout the guidelines (CompTel initial comments at 12-17; MCI initial comments at 50; Cincinnati Bell initial comments, Appendix C at 1; Scherers initial comments at 5; United/Sprint initial comments at 5-6; GTE initial comments, Appendix C at 1-2; AT&T initial comments, Appendix C at 1; TCG initial comments at 11-12). Ameritech and ALLTEL assert that the staff's distinction between facilities-based and nonfacilities-based carriers, based on the control and ownership of a switch, does not comport with the singular definition of a telephone

company found in Section 4905.03(A)(2), Revised Code, nor with the Commission's previous certification practices. Ameritech and ALLTEL suggest adopting one definition of local exchange service provider that is consistent with Section 4905.03, Revised Code, and affording all carriers meeting that definition with the rights and responsibilities of common carriers. Ameritech and ALLTEL also suggest amending the staff's proposal to clarify that a telephone company includes not only an entity which owns or controls switching equipment but also one with transport capabilities that result in the transmission of a telephonic message. Ameritech would further clarify the definition by establishing that a lease arrangement falls within the language of Section 4905.03, Revised Code (Ameritech initial comments at 20-21; ALLTEL initial comments at 18).

The United States Department of Defense and All Other Federal Executive Agencies (FEAs) aver that the proposed definition of facilities-based carriers is too restrictive (FEA initial comments at 3). OCTA claims that a better approach would be to distinguish between incumbent providers and new entrants (OCTA initial comments at 3). GTE maintains that the proposed distinction engenders serious opportunities for arbitrage and, in any event, will create administrative nightmares as a NEC's status will always be in a state of flux (GTE initial comments at 1-2). Westside Cellular Inc. dba Cellnet of Ohio, Inc. (Cellnet) argues that the staff's proposal represents a radical departure from past Commission practice established in *The Hogan Company dba Interwats* case.¹¹ In that case, according to Cellnet, the Commission correctly held that, because *Hogan* did not own or operate switching or transmission facilities, it was not a telephone company as defined in Section 4905.03, Revised Code (Cellnet initial comments at 3).

CompTel supports certification for so-called "pure resellers." The important issue is, according to CompTel, that local facilities ownership should not determine the rate a carrier pays or whether it is entitled to purchase out of a carrier-to-carrier tariff (CompTel reply comments at 13). ETI maintains that a distinction based upon whether a carrier determines to become certified is certainly appropriate. For instance, a reseller which chooses to seek certification and agrees to undertake certain regulatory obligations should be permitted to buy services out of the carrier-to-carrier tariff (ETI reply comments at 3-7). United/Sprint submits that local service requires a higher standard of care than toll services; therefore, the Commission should treat local facilities and nonfacilities-based carriers the same for regulatory purposes (United/Sprint reply comments at 3).

After reviewing all of the comments concerning the facilities/nonfacilities-based distinction, the Commission finds that there is no rational reason to distinguish between facilities-based and nonfacilities-based carriers for most purposes. That is, all certified providers of basic local exchange service should have, except as specifically noted otherwise herein, the same rights and regulatory obligations as the ILECs. There are, however, still reasons for maintaining the distinction between facilities and nonfacilities-based providers throughout a limited number of specific sections of these

¹¹ Case No. 90-1802-TP-ACE, Finding and Order issued December 5, 1991.

company found in Section 4905.03(A)(2), Revised Code, nor with the Commission's previous certification practices. Ameritech and ALLTEL suggest adopting one definition of local exchange service provider that is consistent with Section 4905.03, Revised Code, and affording all carriers meeting that definition with the rights and responsibilities of common carriers. Ameritech and ALLTEL also suggest amending the staff's proposal to clarify that a telephone company includes not only an entity which owns or controls switching equipment but also one with transport capabilities that result in the transmission of a telephonic message. Ameritech would further clarify the definition by establishing that a lease arrangement falls within the language of Section 4905.03, Revised Code (Ameritech initial comments at 20-21; ALLTEL initial comments at 18).

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guidelines (e.g., for universal service and unbundling). The final guidelines have, therefore, been revised accordingly. One such area where the facilities/nonfacilities-based distinction is not a viable one is in the obligation to become certified for those entities meeting the definition of a telephone company subject to the Commission's jurisdiction under Section 4905.03(A)(2), Revised Code.

Section 4905.03(A)(2), Revised Code, defines a telephone company subject to Commission jurisdiction as "[a]ny person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, when engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier." By the definitions found throughout Section 4905.03, Revised Code, the Ohio General Assembly is directing the Commission to regulate that aspect of service between the consumer and the entity holding itself out as the provider of service. Thus, in making a determination as to our jurisdiction over providers of local service, we must consider if the entity is (1) engaged in the business of transmitting telephonic messages; (2) to, from, through, or in Ohio; and (3) as such is a common carrier.

First, we turn to the question of what is a telephone common carrier. While there is no definition of this term in the Ohio Revised Code or in any legislative history, the Ohio Supreme Court in *Celina*, at page 492, set forth its interpretation of what this concept means. The Court found that a telephone common carrier:

undertakes, for hire or reward, to carry, or furnish the medium for carrying, messages, news, or information, for all persons indifferently, who may choose to employ it, or use such medium, from one place to another. The telephone company then must serve, without discrimination, all who desire to be served and who conform to the reasonable rules of the company.

Because there is limited precedent dealing with the issue of telephone common carriage in Ohio, it is helpful to look at treatment of the issue in other jurisdictions. One such jurisdiction that has had substantial opportunities to address the issue of common carriage is the Federal Communications Commission (FCC). The FCC applies similar criteria to those set forth by the Ohio Supreme Court in its determinations of what constitutes a telephone common carrier subject to FCC jurisdiction; therefore, an evaluation of FCC precedent is helpful to an interpretation of our jurisdictional authority. Criteria the FCC considers includes: (1) whether the entity is offering services to the public indiscriminately; (2) whether the entity transmits intelligence of the user's own design and choosing; (3) whether the entity is providing service for profit; and (4) whether the entity is engaged for hire in interstate or foreign communication.¹²

In evaluating this concept of indiscriminate offering to the public, which is analogous to offering the service, without discrimination, to all persons who desire to

¹² 46 ALR Fed 626.

be served, as referenced by the Ohio Supreme Court, the District of Columbia Court of Appeals determined in *AT&T v. FCC*¹³ that:

[T]his does not mean that a given carrier's services must practically be available to the entire public, but rather, one may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the population, and business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted.

Another factor applied by the FCC to evaluate the indiscriminate offering to the public standard is the concept of offering service for a profit. In approving the use of profit as a criteria in evaluating the indiscriminate offering to the public, the Second Circuit Court of Appeals in *AT&T et.al. v. FCC*¹⁴ stated "[P]rofit is a significant indicium of common carriage; it increases the likelihood that the party making the profit is also making an indiscriminate offering to the public." This consideration of profit as a criteria is similar to the language set forth in *Celina* to the extent that service is offered for hire or reward. The Second Circuit Court of Appeals in *AT&T et al. v. FCC* also noted that the indiscriminate offering of service to the public can be established regardless of the actual ownership or operation of the facilities involved.¹⁵ Two remaining indicia of an indiscriminate offering to the public were approved by the Second Circuit Court of Appeals. Those criteria are looking to the use of advertising or of short-term joint arrangements; either of which may signal the existence of an indiscriminate offering to the public. *AT&T, supra*.

Regarding the issue of transmitting intelligence of the customer's own choosing, the FCC held in *Frontier Broadcasting Co. v. Collier*¹⁶ that, while the carrier provides the means or methods of communication, the choice of the specific intelligence to be transmitted is the sole prerogative of the subscriber. The final criteria the FCC evaluates in determining an entity's common carrier status is the issue of interstate or foreign communications. This correlates to the standard set forth by the Ohio Supreme Court that the activity in question must be "to, from, through or in" Ohio. Having discussed the similarity between the criteria the FCC uses to determine if a given entity is a common carrier and the standards the Ohio Supreme Court set forth in evaluating the concept of common carriage, we find such precedent compelling and will adopt it in the appropriate areas in making our determinations of what is a common carrier.

At the time the definition of a telephone company in Section 4905.03(A)(2), Revised Code, was established and the order in *Celina* was issued, it was clear that telephone service was only provisioned over telephone facilities owned by the entity

¹³ 525 F2d 630, cert den 425 US 992 (1978).

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involved and such provision qualified as common carriage under the applicable definitions. New questions have arisen, however, given the state of technology available today. One new practice which raises issues involving telephone service involves parties purchasing private line or bulk-billed services and either sharing service among various parties or reselling or rebilling the service for profit. The FCC in its Docket No. 20097 (*Resale and Shared Use of Common Carrier Services and Facilities*) adopted July 1, 1976; released July 16, 1976) determined that those entities reselling service¹⁷ meet the definition of a common carrier and, thus, fall under the FCC's jurisdiction while those entities merely sharing service do not fall under the definition of common carriage and, thus, do not warrant FCC jurisdiction. For many of the same reasons espoused by the FCC in its *Resale* decision, we determine that those entities involved in the reselling or rebilling of service to consumers satisfy the criteria of being common carriers which may be subject to Commission jurisdiction. Next, we must determine whether those resale/rebiller entities who are common carriers are "engaged in the business of" transmitting telephonic messages.

Crucial to our determination of whether an entity is engaged in the business of transmitting telephonic messages is the relationship the involved entity has with its customers. For example, portraying or holding oneself out to the end user as the entity responsible for establishing service, addressing consumer concerns and complaints, and receiving remuneration for services rendered are all indicia of engaging in the business of transmitting telephonic messages. To the extent a reseller/rebiller satisfies both the "common carrier" and "engaged in the business of" criteria set forth in Section 4905.03(A)(2), Revised Code, we see no difference, except for the ownership of telephone plant, between resale and traditional telephone service. As the FCC stated in the *Resale* decision, "[T]he public neither cares nor inquires whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do. The ultimate test is the nature of the offering to the public." We concur with the FCC's reasoning on the issue of resale and, as addressed more fully below, we will exercise our jurisdiction over resellers/rebillers who seek to provide basic local exchange services to end users in Ohio.

The Commission also desires to address the averment raised by Cellnet that our *Hogan* decision requires a different result. Contrary to the arguments raised by Cellnet, *Hogan* does not require a different determination. *Hogan* was specifically limited by the Commission to representations made by the company in its application. This is evidenced by the fact that entities with operations similar to *Hogan* were still directed to file for an affirmative determination as such from the Commission. In finding that there were no public policy concerns which warranted Commission action at that time, the Commission found persuasive the fact that *Hogan* was not holding itself out as an interexchange carrier. Rather, the company was merely serving as an agent for end users in obtaining telecommunication services which satisfied the end user's needs.

¹⁷ Resale was defined by the FCC as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without adding value) for profit."

Through this agency relationship, we expected that *Hogan* would act as a consultant evaluating the telecommunications services and facilities of and recommending options to end user's which would most effectively meet the end users needs. It has, however, subsequently been brought to our attention that entities such as *Hogan* have been holding themselves out as the end user's telecommunications provider, the entity actually providing interexchange service to consumers and receiving recurring remuneration for telephone usage of the end user. Therefore, as outlined above, this type of activity qualifies a telecommunications provider who is reselling as a telephone company subject to Commission jurisdiction.

Another primary factor influencing our decision in *Hogan* was that we foresaw no significant public policy concerns which warranted Commission action, including requiring those entities to submit to our direct jurisdiction. History has shown, however, that since the *Hogan* decision, we have received a substantial number of complaints from consumers alleging that their interexchange carrier service had been switched to another carrier without their authority. This process has become known in the industry as "slamming". Many of these slamming complaints are attributable to those entities heretofore deemed to be rebillers like *Hogan*. Finally, the Commission limited its waiver that it granted *Hogan* and similar rebillers to interexchange services. The scope of the applicable regulation of those entities in the provision of local exchange service is being considered, for the first time in this docket. While we need not address in this local competition proceeding the regulations applied to rebillers of interexchange services, the Commission is not ruling out such a proceeding in the future. On the issue of competition in the local exchange service market, however, sound public policy dictates that, at this time, we maintain full jurisdiction over those entities satisfying the criteria, set forth above, which determines what is a telephone company subject to Commission regulation pursuant to Section 4905.03(A)(2), Revised Code. All telephone companies engaged in the business of providing basic local exchange services will be subject to the standards currently applicable to the ILECs. Examples of such standards include, but are not limited to, certification, end user tariffs, annual reporting requirements, the appropriate tax authority, and universal service expectations.

By this decision, we are not ruling out the possibility that later experience may show that the public interest would be better served by revising the regulations applied to all ILECs including resellers and rebillers. If so, to the extent the law allows it, we may review this matter and act accordingly. The Commission would also note that we can utilize the flexibility provided by Section 4927.03, Revised Code, for competitive telephone companies and Section 4927.04(B), Revised Code, for those providers serving less than 15,000 access lines in order to tailor regulatory requirements to meet the individual provider's needs in an appropriate regulatory proceeding. We have done so in the guidelines to tailor our regulation of these entities to address the principal problem that have arisen, namely, fair dealing with Ohio's consumers.